SUPREME COURT

OF THE

UNITED STATES.

Appeal from U. S. Circuit Court of Appeals, Ninth Circuit.

Otto Groeck, et al.,
Appellants,

vs.

Southern Pacific Railroad Company,
Appellee.

Brief for Appellants.

STATEMENT.

In this case the Southern Pacific Railroad Company filed its bill of complaint against the defendants on February 12, 1892 [Record 26], seeking to establish a trust in favor of complainant for a certain eighty acres of land in Kings county, California, and further seeking a decree requiring the defendants to convey the legal title to the complainant.

The land was acquired by the defendants from the United States by virtue of a pre-emption settlement

and entry made by defendant Groeck on September 2, 1885, final proof on June 7, 1886, and patent from the United States on April 11, 1890 [Record 63, 64].

The Southern Pacific Railroad claims to have a superior right to the land by virtue of the provisions of section 18 of the Act of Congress of July 27, 1866 [14 U. S. Stat. 292], and the provisions of the joint resolution of Congress of June 28, 1870 [16 U. S. Stat. 382], making a land grant to aid in the construction of a railroad from San Francisco, via Mojave, to the Colorado river at Needles.

The first and only authority which the Southern Pacific had to construct this railroad and to receive a grant of lands upon the line from San Francisco, via Mojave to Needles, was granted by the joint resolution of June 28, 1870 [Sec. 25 L. D. 223, 229, and 98 Fed. 27, 39], but for the purposes of disposing of this case it is not important whether the grant was made in 1870 or in 1866.

The Southern Pacific Company completed the railroad from San Jose, via Mojave to Needles (in sections), at various dates between 1870 and 1889, *excepting that part between Alcalde and Tres Pinos* [Record 61, 62], and, as the road was constructed, filed sectional maps of definite location showing the completed road, but never filed any map of definite location of that part of the road between Alcalde and Tres Pinos [Record 61, 8th item].

The Southern Pacific filed its map of definite location of that section of road opposite to the land in controversy on *April 2, 1889* [Record, 61 bottom, 62 top, and 63 top].

The land in dispute is outside of the granted limits of the road, but within the indemnity limits; that is, the limits within which the railroad was authorized to make selections under the direction of the Secretary of the Interior in lieu of lands lost within the place limits [Record 62, bottom].

The Southern Pacific made application to select this land as indemnity on July 13, 1891 [Record 64], which was *six years* after defendant Groeck settled upon and pre-empted the land, a year and a third after the land was patented to defendant Groeck under his pre-emption entry, and *twenty-one years* after the passage of the joint resolution of Congress of June 28, 1870, making the grant of lands under which complainant claims title, and by the terms of which act the Southern Pacific was authorized at that time to file a map of definite location and select indemnity lands.

The defendants answered to the merits, and the cause was submitted upon stipulated facts [Record 59-66], and thereupon the court adjudged the equities to be with the complainant, and passed a decree for the relief sought. [Record 41.] Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was affirmed. [Record 85.]

Specifications of Errors.

Appellants' assignment of errors is in the Record at pages 86, 87.

Points and Authorities.

FIRST.

The Controlling Questions in this Case, Namely, that there was no Authority to Withdraw the Indemnity Lands, as Against Homestead and Pre-emption Entries, and that Patents Issued to Settlers Under Such Entries are Valid, has Been Lately Presented and Fully Determined by the Court Adversely to the Contentions of the Appellees in the Present Case.

In the following cases, fully argued, submitted and determined and opinion filed on January 7, 1901, it was decided by the court in construing the grant to the Northern Pacific Railroad Company, act of Congress July 2, 1864 [13 Stat. at L. 365, chapter 217], which is identical with the grant to the Southern Pacific and Atlantic and Pacific Railroads of July 27, 1866, 14 Stat. at L. 292.

1. That the act did not provide for a withdrawal or reservation of indemnity lands;

2. That the Secretary of the Interior was not authorized to reserve the indemnity lands;

3. That the act contemplated that the indemnity lands were to remain open to homestead and pre-emption entry; and

4. That patents issued to settlers, under the homestead and pre-emption laws, within such indemnity limits, based upon entries made prior to a selection by the railroad company, approved by the Interior Depart-

ment, were valid as conveyances of the land against the railroad title.

See

Hewitt v. Schultz, 180 U. S. 139
Powers v. Slaght, 180 U. S. 173
Moore v. Stone, 180 U. S. 180
Moore v. Cormode, 180 U. S. 167

These recent and carefully considered decisions of the court upon these vital questions, which fully control the issues in the present suit, renders it unnecessary to further argue them, as the contentions now made by counsel for appellees were made and fully presented and denied by the court in the argument in the former suits.

SECOND.

In Filing its Map of General Route on January 3, 1867, and Securing a Temporary Reservation at that Time, the Southern Pacific did not Acquire, by Virtue Thereof, any Right or Title to any Lands Along the Line.

New Orleans Railroad v. Parker, 143 U. S. 42, 57, 58;
United States v. Southern Pacific, 146 U. S. 570, 599, 600;
Southern Pacific v. United States, 168 U.S. 1, 41, 42;
United States v. Oregon Railroad, 176 U. S. 28.

The act of Congress, under which the Southern Pacific claims title, does not provide that any title or right shall vest in the company prior to definite loca-

tion of the road, but fixes the time of filing that map as the time when its grant to lands in place shall attach, and requires the company to *select* indemnity lands to which it may be, entitled, under the direction of the Secretary of Interior.

In requiring the company to file a map of general route by section 6 of the act, there is no provision whatever for the withdrawal of the lands within the indemnity limits, and certainly no provision granting any title prior to definite location.

Obviously the requirement that the company should file a map of general route was not wholly for the benefit of the company, but to protect the public as well, and to inform the Land Department of the general route of the road, prior to definite location. Even if this section had required a withdrawal of lands that would not pass title to the company, in view of the express requirement of section 3 of the act that the company should file a map of definite location and that title should pass only at that time.

THIRD.

Until Selection of Indemnity Land has been Made by the Company, Approved by the Secretary of the Interior, no Right or Title Passes to the Company.

Wisconsin Central Railroad v. Price County, 133 U. S. 496, 511, 512;

Ryan v. Railroad Company, 99 U. S. 382, p. 386;

St. Paul Railroad v. Winona Railroad, 112 U. S. 720, p. 731;

Sioux City Railroad v Chicago Railroad, 117 U.S. 406, p. 408;
Barney v. Winona Railroad, 117 U. S. 228, p. 232;
Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 41, 42;
United States v. Missouri Railroad, 141 U. S. 358, p. 374;
New Orleans Railroad v. Parker, 143 U. S. 42, pp. 57, 58;
Southern Pacific Railroad v. Wood, 124 Cal. 475, 481;
Hewitt v. Schultz, 180 U. S.

The settled doctrine of the court upon this question which was applied in Wisconsin Railroad v. Price county, *supra*, 133 U. S. 496, 511, 512, is there expressed by the court in the following language:

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place,

whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands, and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established, and in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States."

In harmony with these decisions of the court is a long line of decisions of the Interior Department, running through a series of many years, uniformly holding that no right or title to any particular tract of

indemnity land passes until it has been selected and approved, and until which time the land is open to disposal by the Land Department.

Brady v. S. P. R. R. Co., 5 L. D. 658;
Secretary Lamar to President, 6 L. D. 77;
Atlantic and Pacific R. R. Co., 6 L. D. 84, 85;
N. P. R. R. Co. v. Miller, 7 L. D. 100;
S. P. R. R. Co. v. Meyer, 9 L. D. 250;
N. P. R. R. Co. v. Walters, 13 L. D. 330;
S. P. R. R. Co. v. Wasgatt, 13 L. D. 145;
S. P. R. R. Co. v. McWharter, 14 L. D. 610;
S. P. R. R. Co. v. Waters, 17 L. D. 270;
S P. R. R. Co., 18 L. D. 314;
S. P. R. R. Co. v. McMahon, 21 L. D. 402;
N. P. R. R. Co. v. Lillethun, 21 L. D. 487;
S. P. R. R. Co. v. McKinley, 22 L. D. 493;
S. P. R. R. Co. v. Kanawyer, 23 L. D. 500;
N. P. R. R. Co. v. Ayers, 24 L. D. 40;
S. P. R. R. Co. (joint resolution of 1870), 25 L. D. 223;
S. P. R. R. Co. v. Davis, 26 L. D. 595;
N. P. R. R. Co. v. Gunther, 26 L. D. 340;
Lund v. N. P. R. R. Co., 27 L. D. 348;
N. P. R. R. Co. v. Blain, 27 L. D. 361;
State of California v. S. P. R. R. Co., 27 L. D. 542.

Upon well settled principles the uniform construction of these laws by the Interior Department should not be overturned, unless clearly wrong.

United States v. Graham, 110 U. S. 219;
United States v. Philbrick, 120 U. S. 59;
Hastings Railroad v. Whitney, 132 U. S. 360.
Hewitt v. Schultz, 180 U. S.

FOURTH.

When the Selection has been Approved by the Secretary of the Interior the Equitable Title Passes to the Company, but only when Patent is Issued, Under the Provisions of Section Four of the Act of July 27, 1866, Does the Full Legal Title Pass, and Until Patented the Land is Within the Control of the Interior Department.

It is required by the Act of July 27, 1866 (Section 4), as well as by the amendatory act or resolution of June 28, 1870, that the title to lands earned by the company shall pass by the issuance of a patent.

The patent of the United States is the solemn instrument provided by law as complete evidence of the performance of all conditions by the patentee, and as a determination of all *facts* favorable to the patentee which are required to be established as antecedent to its issuance and is full and complete evidence of the passing of the legal title.

It is the settled doctrine in the disposal of the public lands that where a patent is required or contemplated the legal title and control of the land can not pass from the Land Department without its issuance, as there are many questions of fact to be determined by the Land Department, which has exclusive jurisdiction of such matters, and many matters of discretion are involved.

In Barden v. Northern Pacific Railroad, 154 U. S. 288, 327, the court said:

> "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any

portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

And in applying the principle the court held that the determination as to the mineral character of lands was vested exclusively in the Land Department.

In Wisconsin Railroad v. Price County, 133 U. S. 496, it was distinctly decided, upon a full review of the authorities, that in the matter of the selection of railroad indemnity lands there were antecedent facts to be determined by the Land Department and judicial discretion to be exercised by the Secretary of Interior, and it is necessary for the Land Department to determine whether such a loss has been made in place limits as authorized the selection of indemnity, whether the land sought to be selected is open to be taken as such indemnity, and whether it is of the character of land which the company might select, and it might be added that it must be determined whether the applications to select are in due form, whether the land is mineral land, swamp land, coal land, or whether it is otherwise public agricultural land subject to selection. These, as well as numerous other antecedent questions, must be determined by some tribunal, and if not by the Interior Department, then by whom? It can not be possible that these questions can be determined by the railroad com-

pany in its own favor, and its judgment enforced by legal proceedings in the courts.

In Michigan Land Company v. Rust, 168 U. S. 589, 592, it was adjudged that under the swamp land act of 1850, which provided for a listing of the land, to be approved by the Interior Department, and a patent in due form of law, that even after the land had been listed and certified, that the Interior Department had the power to review the proceedings, cancel the listing and patent the land to another under a later entry.

In Brown v. Hitchcock, 173 U. S. 473, which also arose under the swamp land act, it was held that the legal title did not pass until patent issued, and that all questions of facts and proceedings were open to review and reconsideration in the Interior Department, prior to issuance of patent.

In Rogers Locomotive Works v. American Emigrant Company, 164 U. S. 559, 574, it was adjudged that lands claimed under the swamp land grant of 1850, which were included in a list certified to the state under a railroad grant, that such certification was a conclusive determination by the Interior Department of the non-swamp character of the land.

In the recent case of Hawley v. Diller, 178 U. S. 476, it was held that even after entry and final proof of a tract of land under the timber and stone act, that the Land Department had the power to cancel the entry and issue a patent to another under a different entry.

From these authorities it cannot be reasonably doubted that the Land Department is a special tribunal clothed at least with quasi-judicial powers, having ex-

clusive jurisdiction and control of the public lands, and that its determination of all questions of fact is conclusive, and that it may exercise wide discretion as to other matters preliminary to the issuance of patent.

Such being the law, it is submitted that until the selection of the Southern Pacific had been approved prior to a disposal of this land for other purposes or to another, that no right or title was vested in the company, and that when so approved, equitable title would pass, subject to be cancelled or annulled by the Interior Department, upon reasonable or proper grounds, and that when only patent issues can the company acquire a full legal title.

As this tract of land was patented to defendant Groeck long before the company even applied to select the land, it is submitted that no right or title is vested in the company.

FIFTH.

The Facts Found by the Land Department Upon the Issuance of the Patent to Defendant Groeck are Conclusive Against the Southern Pacific.

Authorities *supra*.

Also,

Steel v. Smelting Company, 106 U. S. 447, 457:
Lee v. Johnson, 116 U. S. 48;
Heath v. Wallace, 138 U. S. 573, 585;
United States v. Marshal Company, 129 U. S. 579, 588;
Russell v. Maxwell Land Grant Company, 158 U. S. 253;

SIXTH.

The Complainant's Suit is Barred by Laches.

As pointed out in the foregoing statement the complainant was authorized to file its map of definite location and select the indemnity lands as early as 1870.

It did nothing in that respect until it filed the section of its map of definite location opposite the land in suit on April 2, 1889, *which was nineteen years of delay and procrastination.*

The railroad did nothing after that toward selecting the land until in 1891, more than a year after the land had been patented to defendant Groeck and six years after the date of Groeck's preemption.

It would seem that if there were any case in equity to which the doctrine of laches should be applied that it is presented here.

The complaint in agreed facts admits that Groeck has resided upon the land, cultivated and improved it during many years, and now, at this late date, the railroad company concludes it would like to take the land.

It is submitted that this is not equitable or just, and that such a claim cannot be sustained in a court of conscience.

Of course, the defendant cannot be placed in *statu quo*, as the six and a half years spent by Groeck in reclaiming the land from the desert, while the railroad company stood silent and by its acquiescence encouraged the work, cannot be restored to him.

While courts of equity uniformly apply the bar of the statute, by analogy, within the time provided for by statutes of limitations, in the following cases the

bar of laches appears to have been applied in a shorter period than provided by any statute of limitations:

Twin Lick Oil Company v. Marbury, 91 U. S. 587, pp. 591-593;
Brown v. Buena Vista Co., 95 U. S. 157;
Hayward v. National Bank, 96 U. S. 611, p. 617;
Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 39-42;
Holgate v. Eaton, 116 U. S. 33 pp. 40, 41;
Davison v. Davis, 125 U. S. 90, p. 98;
Societe v. Milliken, 135 U. S. 304, p. 308;
Makall v. Casilear, 137 U. S 556, p. 566;
Felix v. Patrick, 145 U. S. 317, p. 332;
Johnson v. Standard Company, 148 U. S. 360, p. 369;
Halstead v. Grinnon, 152 U. S. 412, p. 416;
Alsop v. Riker, 155 U. S. 445, pp. 458-460;
Continental Bank v. Heilman, 86 Fed. 514, 517, (C. C. A.)

But however this may be, in California, an action to recover real estate must be brought within five years.

Code Civil Procedure, Sec. 318.

Indeed, courts of equity sometimes are so averse to granting relief where there has been great delay or where the parties cannot be placed in *statu quo* or where by the acquiescence of the complainant the defendant has been suffered to make expenditures, that the court will, upon its own motion, apply the bar of laches, even where not raised by the parties by demurrer, plea, answer or argument.

Alsop v. Riker, 155 U. S. 448, pp. 458-460;

Willard v. Wood, 164 U. S. 502, pp. 524, 525;
Whitney v. Fox, 166 U. S. 637, p. 647;
Penn. Insurance Company v. Austin, 168 U. S., 685, p. 696.

It was suggested in the opinion of the Court of Appeals that the failure of the railroad to file its map of definite location was not such laches as could be availed of by the defendant, but that the government alone could complain.

In this thought the important decision of the court in Cedar Rapids Railroad v. Herring, 110 U. S. 27, at pp. 39, 42, appears to have been insufficiently considered.

In that case the very point under consideration was as to the effect of the failure of the railroad *for three years* to file its map of definite location and select the land, and it was distinctly adjudged that the failure to perform those acts prevented a recovery by the railroad company against the homestead settlers. And the court said, at p. 41:

> "*If plaintiff has been injured it is by its own laches. If there is no land to satisfy its demands it is because it delayed over three years to file its map to establish the line of its road, and for years afterward to make selections*"

In conclusion, it is submitted that the decree of the courts below should be reversed, and the cause remanded with instructions to dismiss the bill.

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